

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:
CC:CORP:BO2-PLR-100634-00
Date:
July 7, 2000

LEGEND:

Parent =

Purchaser =

Sub 1 =

Sub 2 =

Target =

Sellers =

Company Official =

Tax
Professional =

Business A =

Date A =

Date B =

Date C =

X% =

Y% =

Dear:

This letter responds to a letter dated December 21, 1999, requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. The extension is being requested by Parent (as common parent of the consolidated group of which Purchaser is a member) to file an election under § 338(g) of the Internal Revenue Code and § 1.338-1(d) of the Income Tax Regulations, with respect to Purchaser's acquisition of the stock of Target

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(sometimes hereinafter referred to as the "Election"), on Date A. (All citations in this letter to regulations under § 338 are to the regulations as in effect on Date A). Additional information was received in letters dated March 16, June 16, and June 21, 2000. The material information submitted for consideration is summarized below.

Parent is the common parent of a consolidated group that files its return on the basis of a calendar taxable year and that uses the accrual method of accounting. Parent owns X% (over 80%) of Sub 1 (individuals owning the remaining interest) and Sub 1 owns Y% (over 80%) of Purchaser (individuals owning the remaining interest). Sub 2 is wholly owned by Purchaser. Sub 1, Sub 2, and Purchaser are included in Parent's consolidated federal income tax return. Target is a foreign corporation (the country of formation and residency is set forth in the above redacted legend) that was wholly owned by Sellers. Sellers are foreign individuals and partnerships (the country of formation/citizenship and residency is set forth in the above redacted legend), and it is represented that each of the Sellers is not a United States shareholder, as defined in § 951(b). Both Purchaser and Target are engaged in Business A. Target does not have any subsidiaries.

Prior to the below described acquisition, Target and Sellers did not file U.S. income tax returns and they were not subject to U.S. income taxation. Further, Target was not: (1) a controlled foreign corporation within the meaning of § 957(a); (2) a passive foreign investment company for which an election under § 1295 was in effect; (3) a foreign investment company or a foreign corporation the stock ownership of which is described in § 552(a)(2); or (4) required, under § 1.6012-2(g), to file a U.S. income tax return.

On Date A, Purchaser acquired all of the Sellers' stock of Target for cash, stock of Purchaser, the assumption of Target liabilities and transaction costs in a fully taxable transaction (Purchaser also acquired numerous other foreign entities from Sellers, but they are not relevant to this request). It is represented that the Sellers' transfer of Target stock to Purchaser in exchange for stock of Purchaser does not qualify under § 351(a) (Purchaser has been a subsidiary of Parent for years and the amount of stock received by the Sellers did not give them "control" of Purchaser, and, in fact, constitutes less than 20 percent of the outstanding stock). Immediately after the acquisition Purchaser transferred all of the stock of Target to Sub 2 in a transaction represented to be tax free under § 351(a). It is represented that (1) Purchaser was not related to Sellers within the meaning of § 338(h)(3), and (2) Purchaser's acquisition of the stock of Target constituted a "qualified stock purchase" within the meaning of § 338(d)(3).

Parent intended to file the Election. The Election was due on Date B. However, for various reasons the Election was not filed. On or about Date C (which is after the due date for the Election), Tax Professional discovered that the Election had not been made. Subsequently, this request was submitted, under § 301.9100-1, for an extension

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of time to file the Election.

It is represented that the period of limitations on assessments under § 6501(a) has not expired for Parent's, Purchaser's, Sub 1's, Sub 2's or Target's taxable years in which the acquisition occurred, the taxable year in which the Election should have been filed, or any taxable year(s) that would have been affected by the Election had it been timely filed.

Section 338(a) permits certain stock purchases to be treated as asset purchases if the purchasing corporation makes or is treated as having made a "section 338 election" under § 338(g) and the acquisition is a "qualified stock purchase." Section 338(d)(3) defines a "qualified stock purchase" as any transaction or series of transactions in which stock (meeting the requirements of § 1504(a)(2)) of one corporation is acquired by another corporation by purchase during the 12-month acquisition period.

Section 338(h)(3)(A) provides that the term "purchase" means any acquisition of stock, but only if (1) the basis of the stock in the hands of the purchasing corporation is not determined in whole or in part by reference to the adjusted basis of such stock in the hands of the person from whom acquired, or under § 1014(a) (relating to property acquired from a decedent); (2) the stock is not acquired in an exchange to which § 351, 354, 355, or 356 applies and is not acquired in any other transaction described in regulations in which the transferor does not recognize the entire amount of the gain or loss realized on the transaction; and (3) the stock is not acquired from a person the ownership of whose stock would, under § 318(a), be attributed to the person acquiring such stock.

Section 1.338-1(d) provides that a purchasing corporation makes a "section 338 election" for target by filing a statement of "section 338 election" on Form 8023 in accordance with the instructions on the form. The "section 338 election" must be filed not later than the 15th day of the ninth month beginning after the month in which the acquisition date occurs. A "section 338 election" is irrevocable.

Section 1.1502-77(a) provides that the common parent, for all purposes (other than for several purposes not relevant here), shall be the sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability of the consolidated return year. See also Form 8023 and the instructions thereto.

Under § 301.9100-1(c), the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than six months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

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Section 301.9100-1(b) defines the term "regulatory election" as including an election whose due date is prescribed by a regulation, revenue ruling, revenue procedure, notice, or announcement. Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-1(a). Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making regulatory elections that do not meet the requirements of § 301.9100-2. Requests for relief under § 301.9100-3 will be granted when the taxpayer provides evidence to establish that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government. Section 301.9100-3(a).

In this case, the time for filing the Election is fixed by the regulations (*i.e.*, § 1.338-1(d)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Parent to file the Election, provided Parent shows it acted reasonably and in good faith, the requirements of §§ 301.9100-1 and 301.9100-3 are satisfied, and granting relief will not prejudice the interests of the government.

Information, affidavits, and representations submitted by Parent, Purchaser, Company Official, and Tax Professional explain the circumstances that resulted in the failure to file a valid Election. The information establishes that a competent tax professional was responsible for the Election, that such tax professional was aware of all relevant facts, and that Parent relied on such tax professional to make the Election. The information also establishes that the interests of the government will not be prejudiced if relief is granted. See § 301.9100-3(b)(1)(v).

Based on the facts and information submitted, including the representations that have been made, we conclude that Parent has established that it acted reasonably and in good faith in failing to timely file the Election, the requirements of §§ 301.9100-1 and 301.9100-3 are satisfied, and granting relief will not prejudice the interests of the government. Accordingly, we grant an extension of time under § 301.9100-1, until 30 days from the date of issuance of this letter, for Parent to file the Election with respect to the acquisition of Target stock, as described above.

The above extension of time is conditioned on the taxpayers' (*i.e.*, Seller's, Parent's, Purchaser's, Sub 1's, Sub 2's, and Target's) tax liability (if any) being not lower, in the aggregate, for all years to which the Election applies, than it would have been if the Election had been timely made (taking into account the time value of money). No opinion is expressed as to the taxpayers' tax liability for the years involved. A determination thereof will be made by the District Director's office upon audit of the federal income tax returns involved. Further, no opinion is expressed as to the federal income tax effect, if any, if it is determined that the taxpayers' tax liability is lower. Section 301.9100-3(c).

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Parent should file the Election in accordance with § 1.338-1(d). That is, an election on Form 8023 must be executed on or after the date of this letter, which grants an extension, and filed in accordance with the instructions on the election form. A copy of this letter should be attached to the election form. Parent, Purchaser and Target, should file or amend, as applicable, the necessary returns to report the acquisition as a "section 338 transaction," and to attach thereto a copy of Form 8023 and a copy of this letter.

No opinion is expressed as to: (1) whether Purchaser's acquisition of Target stock qualifies as a "qualified stock purchase," (2) whether the acquisition of Target stock qualifies for § 338(a) treatment, (3) if the acquisition of Target stock qualifies for § 338(a) treatment, as to the amount of gain or loss recognized (if any) by Target on its deemed asset sale, or (4) whether Target is a corporation or partnership.

In addition, no opinion is expressed as to the tax effects or consequences of filing the Election late under the provisions of any other section of the Code and regulations, or as to the tax treatment of any conditions existing at the time of, or resulting from, filing the Election late that are not specifically set forth in the above ruling. For purposes of granting relief under § 301.9100-1, we relied on certain statements and representations made by the taxpayer, its employees and representatives. However, the District Director should verify all essential facts. In addition, notwithstanding that an extension is granted under § 301.9100-1 to file the Election, penalties and interest that would otherwise be applicable, if any, continue to apply.

This ruling is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent. A copy of this letter is being sent to Tax Professional, pursuant to the submission request.

Sincerely,
Philip J. Levine
Deputy Associate Chief Counsel
(Corporate)